Supreme Court, U.S.
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02-1200 FEB 12 2003

No.

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IN THE

Supreme Court of the United States

MARSH & McLENNAN COMPANIES, INC. AND SUBSIDIARIES,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Marsh & McLennan Companies, Inc. and Subsidiaries ("Marsh") is entitled to interest for the full period of time the Government had the use of Marsh's 1985 and 1986 tax overpayments pursuant to sections 6611(b)(1) and 6402(a) of the Internal Revenue Code of 1986 (26 U.S.C.).

RULES 14.1 AND 29.6 STATEMENT

Marsh & McLennan Companies, Inc., (the parent company of Marsh & McLennan Companies, Inc. and Subsidiaries) is a publicly traded company on the New York Stock Exchange. As of the date of this filing, no publicly held company owns 10% or more of Marsh & McLennan Companies, Inc.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 302 F.3d 1369. The opinion of the Court of Federal Claims (App., *infra*, 22a-37a) is reported at 50 Fed. Cl. 140.

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on September 6, 2002, and a timely combined petition for panel rehearing and for rehearing en banc was denied on November 14, 2002 (App., *infra*, 38a-39a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The relevant provisions of 26 U.S.C. §6611, 26 U.S.C. §6402, 26 U.S.C. §6601, 26 C.F.R. §301.6611-1(h), and 26 C.F.R. §301.6402-3(b)(5) are reprinted in the appendix to this petition at 40a-45a.

STATEMENT OF THE CASE

This is a case of *last* impression in which the courts below have adopted analytical approaches sponsored by neither party, and at the same time have ignored the controlling statutory provisions that provide clear guidance. The issue involves the computation of interest on federal income tax overpayments, which, like interest on income tax underpayments, is intended to compensate for the time value of money. The courts below have eschewed the clear and

comprehensive regime of established principles that govern the computation of interest in favor of a result that cannot be reconciled with the statute. In particular, the opinion of the Court of Appeals for the Federal Circuit is squarely at odds with the principles embraced more than two decades ago by the Court of Appeals for the Second Circuit, which principles have been enshrined into the practices and procedures of the Internal Revenue Service for calculating interest on underpayments of tax. Given the unique nature of the jurisdictional statute under which overpayment interest issues arise, the precise issue in this case most likely cannot be addressed by any other Court of Appeals. As a result, this case represents the first – and the last – opportunity for this Court to ensure that the statute is construed properly and the will of Congress is effectuated with respect to the many taxpayers who are confronted by this issue today and those who will face the issue in the future.

Petitioners, Marsh & McLennan Companies, Inc. and Subsidiaries ("Marsh"), overpaid its federal income taxes for 1985, 1986, 1987, and 1988. Marsh elected to apply its 1987 tax overpayment to its 1988 taxes and elected to apply its 1988 overpayment to its 1989 taxes. Tax overpayments for which such elections have been made are known colloquially as "credit elect overpayments." The elections are authorized by section 6402(b) and Treas. Reg. §301.6402-3(b)(5).[1] The election results in the application of a taxpayer's overpayment for one year, as shown on the tax return for such year (and without regard to the correctness of the amount of such overpayment), to the next succeeding year. As a general matter, a credit elect overpayment is transferred to the succeeding year as a payment for such year on (*i.e.*, as

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[1] Unless otherwise indicated, all "section" or "Code" references are to the Internal Revenue Code of 1986 (26 U.S.C.), as amended. All "Regulation" or "Treas. Reg." references are to the Regulations promulgated under the Code.

of) the first date on which it is required to satisfy an estimated tax obligation of the taxpayer, or at the latest, on the date of the last estimated tax payment for the subsequent year. Because Marsh's 1987 estimated tax payments were at all times sufficient to cover its obligations, Marsh's 1987 credit elect overpayment was transferred from 1987 to a payment for 1988 effective on March 15, 1989. On the same principles, Marsh's 1988 credit elect overpayment was transferred from 1988 to a payment for 1989 effective in part on September 15, 1989, and in part on March 15, 1990.

No interest is allowed on a credit elect overpayment. Treas. Reg. §§ 301.6402-3(b)(5) and 301.6611-1(h)(2)(vii). Thus, no interest is allowed on Marsh's 1987 credit elect overpayment that was transferred to 1988, or on Marsh's 1988 credit elect overpayment that was transferred to 1989. However, because Marsh's 1985 and 1986 overpayments were *not* credit elect overpayments there is no statutory or regulatory bar against interest on those overpayments.

In 1994, the Internal Revenue Service ("IRS") determined that Marsh's 1987 and 1988 income tax overpayments were less than the overpayments shown on Marsh's original 1987 and 1988 returns. Because the originally reported overpayment amounts had been transferred to the subsequent years (1988 and 1989, respectively), the 1987 and 1988 years were in a tax deficiency posture. For example, the net tax paid for 1987, after the transfer out of the credit elect overpayment, was less than the correct tax liability for such year, but only as of March 15, 1989, *i.e.*, the date on which the credit elect overpayment was transferred from 1987 to a payment for 1988. Similarly, the net tax paid for 1988 dipped below the correct tax liability effective on the dates that portions of the credit elect overpayment were transferred from 1988 to payments for 1989.

In these circumstances, the IRS typically issues a notice of deficiency or otherwise assesses the deficiency in income tax for the year in which the credit elect overpayment originally arose, and collects from the taxpayer both the tax and interest on that deficiency. As established by the Second Circuit in *Avon Products, Inc. v. United States*, 588 F.2d 342 (2d Cir. 1978), and a long list of other authorities and procedures, the starting date for such underpayment interest is the date on which the credit elect overpayment was transferred to the succeeding year. Based on Marsh's facts for 1987, Marsh would have been obligated to pay interest on the "deficiency" for 1987 from March 15, 1989 – the date on which the credit elect overpayment was transferred from 1987 to a payment for 1988 – until the date on which the deficiency was paid.

In this case, however, Marsh had pre-existing income tax overpayments for 1985 and 1986. As a result, instead of pursuing collection of the deficiencies for 1987 and 1988, the IRS chose to invoke its authority under section 6402(a) to credit Marsh's 1985 and 1986 (in part) overpayments as payments of the "deficiency" in Marsh's 1987 taxes. Such overpayments were credited effective on March 15, 1989, the same date on which the 1987 credit elect overpayment was transferred to 1988 and the date on which the deficiency for 1987 arose. Similarly, the IRS credited the remainder of Marsh's 1986 overpayment as payments for 1988 taxes partially on September 15, 1989, and partially on March 15, 1990, which were the respective dates on which the appropriate portions of the 1988 credit elect overpayment were transferred to 1989 and the deficiency for 1988 arose.

There was no "deficiency" for 1987 until March 15, 1989, when the credit elect overpayment for 1987 was transferred to 1988, and therefore no opportunity under section 6402(a) to offset such deficiency using the 1985 and 1986 overpayments until such date. Nonetheless, the IRS allowed Marsh interest on its 1985 overpayment (and that

portion of its 1986 overpayment credited to 1987 taxes) only up to the due date of Marsh's 1987 income tax return (April 15, 1988, as determined by the IRS). With respect to the portion of the 1986 overpayment that was credited to 1988 taxes, the IRS allowed Marsh overpayment interest only up to the due date of Marsh's 1988 income tax return (again, April 15, 1989).[2] The IRS stopped the interest on Marsh's 1985 and 1986 overpayments nearly a full year before they were credited against tax deficiencies.

Based on the statutory language and the long-standing "use of money" principle, interest on the 1985 and 1986 overpayments should run until the dates on which such overpayments were actually credited against the 1987 and 1988 tax deficiencies owed by Marsh. The language in section 6611(b)(1) which requires that overpayment interest[3] run "to the due date of the amount against which the credit is taken" means the date on which the IRS "credit[ed] the amount of [Marsh's] overpayment" under section 6402(a). Further, the Second Circuit's decision in *Avon Products*,

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[2] The correct due date of Marsh's 1987 tax return was March 15, 1988 and the correct due date of Marsh's 1988 tax return was March 15, 1989. The IRS acknowledges that it incorrectly used April 15, 1988 and April 15, 1989 as the due dates for the respective tax returns under its method of calculating Marsh's interest and admits that it is barred by the statute of limitations from seeking a return of any excess interest. App., *infra*, 4a n.2.

[3] "Overpayment interest" refers to the interest that the Government owes a taxpayer "for the time the government has the use of the taxpayer's money" and is governed by section 6611. Rev. Proc. 60-17, 1960-2 C.B. 942, §2.01(1); *IRS Interest Handbook*, III Definition of Terms, I.R.M. (CCH) Exhibit 104.8.1-2 at 12,187-12,189.

although nominally dealing with the underpayment interest[4] provisions of the Code, establishes that a credit elect overpayment (while not bearing interest *itself*)[5] is still considered an overpayment (or more appropriately a "payment") for purposes of calculating overpayment (or underpayment) interest on other amounts under the Code.

The Government's position is that interest on the 1985 and 1986 overpayments should run only until the due date of the return for the year of the taxes against which such overpayments are credited. The Government believes that the language in section 6611(b)(1) pursuant to which overpayment interest runs "to the due date of the amount against which the credit is taken" means the due date of the original return for the tax against which the credit is taken. The Government also believes that a credit elect overpayment should not be treated similarly for underpayment interest and overpayment interest purposes.

The facts in this case are not in dispute. App., *infra*, 1a. The proper interpretation of sections 6611(b)(1) and 6402(a) is the only issue in this case.

The Court of Federal Claims held against Marsh and in favor of the Government based on its perception that Marsh's position would be "completely unpredictable" and because the Government's position "harmonize[d] with the principle of predictability." App., *infra*, 35a. Neither Marsh

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[4] "Underpayment interest" refers to the interest that a taxpayer owes the Government for the use of the Government's money and is governed by section 6601. Rev. Proc. 60-17, §2.01(1).

[5] Marsh does not seek overpayment interest on the 1987 and 1988 credit elect overpayments themselves and does not challenge the regulatory denial of interest imposed on such overpayments by Treas. Reg. §§ 301.6402-3(b)(5) and 301.6611-1(h)(2)(vii).

nor the Government addressed the issue of the relative predictability of the parties' positions on brief or at oral argument.

The Federal Circuit summarily dismissed the administrative "predictability" analysis of the Court of Federal Claims (App., *infra*, 20a) but nonetheless affirmed the result. The Federal Circuit focused on the fact that the 1987 and 1988 taxes against which Marsh's 1985 and 1986 overpayments were applied became due as a result of Marsh's election to apply the "credit elect overpayments" – *i.e.*, the transfer of the 1987 credit elect overpayment from 1987 to 1988 and the transfer of the 1988 credit elect overpayment from 1988 to 1989. *See* App., *infra*, 8a. The Federal Circuit expressly declined to follow *Avon Products*, *supra*, because it "was an underpayment case." App., *infra*, 14a. The Federal Circuit then theorized (explicitly contrary to *Avon Products*) that because Marsh cannot get interest on its 1987 and 1988 credit elect overpayments, such overpayments must not be considered overpayments or payments for purposes of calculating overpayment interest on Marsh's 1985 and 1986 overpayments. *See* App., *infra*, 18a. Even the Government did not advocate this position, and did not address on brief the issue of whether the bar on interest on a credit elect overpayment alters the calculation of interest on a non-credit elect overpayment.

The Court of Federal Claims had jurisdiction over this case under 28 U.S.C. §1491(a)(1). Petitioners, then appellants, Marsh, filed a timely notice of appeal on October 6, 2001 in accordance with 28 U.S.C. §2107(b), 28 U.S.C. §2522, and Rule 4(a)(1)(B), Fed. R. App. P. The Federal Circuit had jurisdiction over such appeal pursuant to 28 U.S.C. §1295(a)(3).

REASONS FOR GRANTING THE PETITION

This case represents an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c). Most importantly, the Federal Circuit failed to conduct a holistic analysis of the relevant statutory provisions. Even though section 6611(b)(1) *cannot apply* without first applying section 6402(a), the Federal Circuit ignored the latter provision because "[s]ection 6611 makes no reference to section 6402" and because "[t]here is no indication in section 6402 that it was designed to affect the running of overpayment interest." App., *infra*, 14a. The Federal Circuit then defaulted to a discussion of the allegedly "ambiguous" language of section 6611(b)(1) and the unenlightening regulations thereunder (Treas. Reg. §301.6611-1(h)). App., *infra*, 9a. This Court has admonished that statutory interpretation is a "holistic endeavor" because a provision that may seem "ambiguous in isolation" is often clarified "by the remainder of the statutory scheme" (*United Savings Ass'n v. Timbers of Inwood Forest Assocs.* 484 U.S. 365, 371 (1988)). The operative language of section 6611(b)(1) – "the due date of the amount against which the credit is taken" – must refer to the date on which the IRS "may credit the amount of such overpayment" under section 6402(a).

The Federal Circuit's failure to properly interpret and apply section 6611(b)(1) is particularly important because, in the absence of review by this Court, the Federal Circuit is effectively the final authority on the subject. While there are many taxpayers that currently have the same overpayment interest issue (and undoubtedly there will be more in the future), Congress has allocated jurisdiction over overpayment interest disputes in excess of $10,000 solely to the Court of Federal Claims, from which any appeal lies to the Federal Circuit. In the absence of review by this Court, the Federal Circuit's decision in this case effectively will be the law of

the land. Accordingly, Petitioners petition this Court to properly resolve this important question of federal law.

Finally, the Federal Circuit's analysis of the relevant statutory and regulatory provisions is directly contrary to the principles that the Second Circuit applied to resolve the exact same question in the context of underpayment interest in *Avon Products*, *supra*. The Federal Circuit departed from the "use of money" principle enunciated and applied in *Avon Products* and the long list of other leading authorities concerning the computation of both overpayment and underpayment interest. This conflict between the Federal Circuit and the Second Circuit should be resolved by this Court.

A. The Issue Presented Is a Recurring One of Significant Practical Importance.

Based on the jurisdiction granted by Congress to the Court of Federal Claims and to the United States District Courts, the Court of Federal Claims (and thus the Federal Circuit) is the only avenue for a taxpayer to contest the computation of interest under section 6611(b)(1) (for amounts in excess of $10,000) with respect to an otherwise agreed overpayment of tax. Because overpayment interest under section 6611(b)(1) is not "assessed or collected," courts have held that such a claim does not come within the jurisdiction of the United States District Courts under 28 U.S.C. §1346(a)(1). *See, e.g., Amoco Products Co. v. United States*, 61 A.F.T.R.2d 88-750 (N.D. Ill. 1988); *Oppel v. United States*, 82 A.F.T.R.2d 98-6810 (9th Cir. 1998) (unpublished memorandum opinion); *see also* Kafka, *Litigation of Federal Civil Tax Controversies* at ¶16.06[1]; *contra*, *Scripps v. United States*, 90 A.F.T.R.2d 02-6835 (S.D. Ohio 2002) (appealable to the Sixth Circuit). As a result, a taxpayer that has faithfully paid its taxes but that takes issue with the calculation of overpayment interest by the IRS, must pursue relief through the Court of Federal

Claims under 28 U.S.C. §1491(a)(1).[6] There will be no other opportunity for taxpayers to contest this erroneous interpretation before another Circuit Court (or United States District Court).

Due to this jurisdictional limitation, this Petition represents the last effective chance presented to any court to hear this issue on the merits. Unless it is addressed by this Court, the Federal Circuit's decision in this case will govern the outcome of all existing and future issues that involve a similar fact pattern. During the course of this litigation, Petitioners have become aware of dozens of other taxpayers who are in a similar posture with respect to the computation of overpayment interest for prior years (some of which have docketed cases), with claims involving millions of dollars.[7] In the future, any taxpayer that elects to apply an overpayment to its tax liability for the subsequent year (*i.e.*,

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[6] Although 28 U.S.C. §1346(a)(2) would allow such a taxpayer to pursue a claim of $10,000 or less in a Federal District Court, any such claim is unlikely to be prosecuted because the costs of bringing and sustaining such a suit would in all likelihood easily surpass $10,000. Moreover, taxpayers typically claim more than $10,000 of additional overpayment interest. Thus, the jurisdictional limits imposed by Congress effectively deny to taxpayers with such overpayment interest claims access to any forum in which to litigate their claims other than the Court of Federal Claims.

[7] *See, e.g., Massachusetts Mutual Life Insurance Co. v. United States,* Fed. Cl. No. 00-204; *Northrop Grumman Corp. v. United States*, Fed. Cl. No. 00-584; *JP Morgan v. United States*, Fed. Cl. No. 00-650; *SBC Communications v. United States*, Fed. Cl. No. 01-11; *Loews Corp. v. United States*, Fed. Cl. No. 01-87; *AT&T Corp. v. United States*, Fed. Cl. No. 01-280; *Securitas USA/Pinkerton Inc. v. United States*, Fed. Cl. No. 01-426; *Ameren Corp. v. United States*, Fed. Cl. 01-455; *Wachovia Corp. v. United States*, Fed. Cl. No. 02-179.

any taxpayer with a "credit elect overpayment") may be subject to the same issue and result. Thus, a wide range of taxpayers will be affected by this case, with no practical opportunity to present the merits to any court in the future.

In addition, there are other situations that do not involve a credit elect overpayment in which an underpayment arises subsequent to the due date of the tax return for such year. For example, in Technical Advice Memorandum 9443007 (May 19, 1994),[8] the IRS addressed another scenario (involving an excessive refund) in which the due date of a tax liability was subsequent to the due date of the tax return for the year. The IRS ruled that the date of an excessive refund "is the 'due date' when the taxpayer's liability to the Government begins," and that "[t]o apply section 6611(b)(1) to the filing date" for the tax year "would be to use section 6611(b)(1) for a purpose not intended by the statute." This is but one fact pattern in which a tax liability against which an overpayment is credited may arise subsequent to the due date of the tax return. This scenario and others like it expand the number of taxpayers potentially subject to the effects of the Federal Circuit's decision.

Finally, the Federal Circuit's opinion creates a dichotomy between the underpayment and overpayment interest provisions of the Code that Congress did not intend. The plain meaning of the statutory provisions, the clear outline of the statutory framework, and the legislative history

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[8] Marsh refers to IRS administrative rulings herein not as "precedent" or "authority," but to "reveal the interpretation put upon [the relevant provisions] by the agency charged with the responsibility of administering the revenue laws," and as "evidence" of the interpretation that "is compelled by the language of" such provisions. *Hanover Bank v. Commissioner*, 369 U.S. 672, 686-687 (1962).

all establish that Congress intended these provisions to be interpreted consistently and harmoniously.

In light of the foregoing, the result in this case will establish the rule of law for the computation of overpayment interest in any scenario in which a prior year tax overpayment is credited against a tax underpayment that arises on a date after the due date of the return. Accordingly, it is imperative that the correct interpretation of the statute is determined and applied in this case. The Federal Circuit failed in this regard. Because the Federal Circuit's analysis and conclusion are wrong it is important that this Court grant this Petition and review the proper application of the statute.

1. The Federal Circuit Failed to Read Section 6611(b)(1) Together with Section 6402(a).

This Court has instructed that statutory construction is a "holistic endeavor." *United Savings Ass'n v. Timbers of Inwood Forest Assocs.* 484 U.S. 365, 371 (1988). A provision that may seem "ambiguous in isolation" is often clarified "by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* In expounding on a statute, a Court cannot be "guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987).

With this principle in mind, it is instructive to examine the relationship between the language of sections 6611(b)(1) and 6402(a). Section 6611(b)(1) provides that "[i]n the case of a credit," overpayment interest shall be allowed "from the date of the overpayment to the due date of the amount against which the credit is taken." Section

6402(a) provides that "[i]n the case of any overpayment, the Secretary . . . may credit the amount of such overpayment . . . against any liability." The IRS did not (and could not) credit Marsh's 1985 overpayment[9] to its 1987 tax account until March 15, 1989, the first date on which a deficiency in tax for 1987 became due. App., *infra*, 3a. Despite this, the IRS allowed Marsh overpayment interest on its 1985 overpayment only through April 15, 1988. App., *infra*, 4a n.2.

The Federal Circuit dismissed Marsh's argument that section 6402 informs the interpretation of the section 6611(b)(1) language because "[s]ection 6611 makes no reference to section 6402" and because "[t]here is no indication in section 6402 that it was designed to affect the running of overpayment interest." App., *infra*, 14a. The Federal Circuit is wrong. Section 6611(b)(1) *cannot operate* without section 6402(a). Section 6402(a) is the *only provision* in the Code pursuant to which the IRS is authorized to credit an income tax overpayment against an income tax liability, and section 6611(b)(1) is *only relevant* when an income tax overpayment is credited against a later arising deficiency amount – that is the *only context* in which section 6611(b)(1) *will ever apply*. Read in context, the "due date of an amount against which the credit is taken" must be the date on which the IRS "credit[s] the amount of [the] overpayment . . . against [the] liability." That date, for the 1985 overpayment, was March 15, 1989.

In addition to this plain statutory language, the legislative history relating to section 6611(b)(1) confirms that Congress intended overpayment interest to continue to run until the overpayment giving rise to such interest was

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[9] Throughout this petition, Marsh may refer only to the facts of the "1985 overpayment" for ease of reference. The relevant law applies to the facts of the "1986 overpayment" in the same manner.

actually credited (offset) against a tax underpayment. In 1958, Congress amended the interest provisions to eliminate certain mismatches in the computation of overpayment interest and underpayment interest,[10] and the Senate Finance Committee explained that the credit of overpayments against underpayments was changed so that:

> [I]n the case of an overpayment which antedates the due date of an underpayment, interest will run on the overpayment only *until such due date*, that is when the *mutuality of indebtedness* arises.

S. Rpt. No. 1983, 85th Cong., 2nd Sess. (1958), 235 (1958) *reprinted in* 1958-3 C.B. 922, 1156 (emphasis added). Congress was clear that "mutuality of indebtedness arises" when "the overpayment and underpayment offset each other." S. Rpt. No. 1983, 85th Cong., 2nd Sess., 99 (1958), *reprinted in* 1958-3 C.B. 922, 1020.

The "mutuality of indebtedness" principle espoused by Congress in 1958 is consistent in all respects with the long-standing "use of money" principle that underlies both

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[10] Prior to 1958, interest on a credited overpayment accumulated until the assessment of a deficiency but underpayment interest on a deficiency which was offset by a credit continued to run "until the date the credit [was] scheduled." This created a mismatch between the underpayment interest the Government charged the taxpayer and the overpayment interest that the taxpayer was owed from the Government. A second mismatch was created when a taxpayer waived restrictions on assessment, which suspended underpayment interest but overpayment interest continued to run until the IRS issued a "notice and demand" for payment of the deficiency. The legislative changes to sections 6601 and 6611 adopted in 1958 were designed to remedy these mismatches. S. Rpt. No. 1983, 85th Cong., 2nd Sess. 234 (1958), *reprinted in* 1958-3 C.B. 922, 1155.

the overpayment interest and underpayment interest provisions. Interest is "paid on a tax overpayment for the time the government has the use of the taxpayer's money [and] is collected, similarly, for the time the taxpayer has the use of the government's money. . . . The underlying objective is to determine in a given situation whose money it is and for how long the other party had the use of it." Rev. Proc. 60-17, §2.01, 1960-2 C.B. 942; *see also Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 565-566 (1950) (interest charged on underpayment for the period of time which the taxpayer, "by its failure to pay the taxes owed, had the use of the funds which rightfully should have been in the possession of the United States").

The date on which the IRS can credit a taxpayer's overpayment against a tax liability of the taxpayer is the date on which the liability first arises. Until that date, the Government has no right to retain the taxpayer's overpayment. Section 6402(a) provides the IRS with the authority to credit an overpayment only against an outstanding liability. Treas. Reg. § 301.6402-1; *Northern States Power Co. v. United States*, 73 F.3d 764 (8th Cir.), *cert. denied*, 117 S. Ct. 168 (1996). The date on which the IRS can first legally credit a tax overpayment against a tax liability necessarily is the date on which overpayment interest ceases to accrue under section 6611(b)(1).

While section 6611(b)(1) standing alone may be "ambiguous" (App., *infra*, 9a), when read in context with section 6402(a), its plain meaning is clear – the due date of the amount against which the credit is taken is the date on which the taxpayer's overpayment is credited against such amount pursuant to section 6402(a). This is the same date on which *underpayment* interest on the amount against which the credit is taken (*i.e.*, the tax liability) begins to run under section 6601(a). *See Avon Products*, *supra*; Rev. Rul. 99-40, 1999-2 C.B. 441 ("The [IRS] will assess interest on a subsequently determined deficiency for the overpayment year

from the date(s) that the overpayment is applied to the succeeding year's estimated taxes.") It is the same date that the amount against which the credit is taken is required to be paid under "law and regulations." Treas. Reg. §301.6611-1(h)(2)(i). All of these dates are the same date - the date of "mutuality of indebtedness" between taxpayer and Government (S. Rep. No. 1983, 85th Cong., 2d Sess., 234-235 (1958), *reprinted in* 1958-3 C.B. 922, 1155-1156), and the date on which the taxpayer and the Government each cease to improperly have the use of each other's money. *See* Rev. Proc. 60-17. In short, while the overpayment interest regime created by Congress is a coherent one, its outlines can only be divined by reading all the statutory language in the context in which it was written and thus the context in which it was intended to be interpreted.

2. The Federal Circuit Misinterpreted and Misapplied Treas. Reg. §301.6611-1(h)(2).

Rather than examining the statutory language, the Federal Circuit essentially begins its "statutory" analysis by analyzing the regulation, Treas. Reg. §301.6611-1(h). App., *infra*, 9a. While Treasury Regulations that reasonably interpret a statutory provision are entitled to deference, the statutory framework is of paramount importance. Before reaching the regulations, "the starting point in every case involving construction of a statute is the language itself" (*Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). Consistent with this principle, the provisions of Treas. Reg. §301.6611-1(h) become coherent only when read in light of the necessary interaction between sections 6611(b)(1) and 6402(a).

Section 6611(b)(1) mandates that overpayment interest run to the "due date of the amount against which the credit is taken." The regulations merely provide guidance as to when that "amount" is "due." Specifically, Treas. Reg.

§301.6611-1(h)(2)(i) provides a general definition of "due date" as "the last day fixed by law or regulation for the payment of the tax." Because Marsh's income tax for 1987 was reported on a return and Marsh's return for 1987 was due on March 15, 1988, the Federal Circuit concluded that interest on the 1985 overpayment is allowed only to March 15, 1988, even though the "amount" against which the 1985 overpayment was credited was not actually "fixed by law or regulation for . . . payment" until one year after the return was required to be filed. The court's interpretation of Treas. Reg. §301.6611-1(h)(2)(i), which arbitrarily truncates overpayment interest on the tax return due date without regard to when the "*amount* against which the credit is taken" is actually "due," is simply wrong.

When interpreted correctly, the regulation itself undermines the Federal Circuit's analysis. The general rule in Treas. Reg. §301.6611-1(h)(2)(i) looks to the date that the amount against which the credit is taken is actually *due* and must actually be *paid* to the Government. The due date for the payment of an amount of tax actually shown on a return is the due date of that return. Sections 6151(a) and 6072(b). The due date for the payment of a later-arising deficiency in tax, however, is not necessarily the due date of the return. The due date for payment of such a later arising deficiency is not until such amount is legally due and owing – actually "fixed by law or regulation for . . . payment" as an outstanding liability under the Code and Regulations. This is the date referenced in Treas. Reg. §301.6611-1(h)(2)(i). As applied to the instant case, it was not until March 15, 1989, that Marsh was required by law to pay the deficiency for 1987 caused by the transfer of its 1987 credit elect overpayment to a payment for 1988. Before that date, such deficiency amount was never "fixed by law or regulation for . . . payment." Indeed, the IRS could not have demanded payment of such a deficiency, or commenced charging interest on such a deficiency, until March 15, 1989. Likewise, the IRS did not have authority pursuant to section

6402(a) to credit Marsh's 1985 overpayment to 1987 until March 15, 1989 – the first date on which Marsh actually had a tax deficiency amount "due" for 1987.

This reading of the "general rule" of Treas. Reg. §301.6611-1(h)(2)(i) in accordance with the statutory provisions of sections 6402(a) and 6611(b)(1) is also consistent with the guidance provided in subsequent subparagraphs of the regulation with respect to specific situations that involve the application of a credit to an "amount" that is "due." For example, Treas. Reg. §301.6611-1(h)(2)(v) provides that in the case of accruing underpayment interest the due date of such interest is the date the interest economically accrues. This date is the first date on which such interest is actually owed to the Government. Furthermore, Treas. Reg. §301.6611-1(h)(2)(vi) provides that in the case of an additional amount, addition to tax, or penalty, the due date is the "earlier of the date of assessment or the date from which such amount would bear interest if not satisfied by payment or credit." Contrary to the Federal Circuit's holding, Treas. Reg. §301.6611-1(h)(2) establishes that the due date of the amount is the date fixed by law or regulations for the actual payment of the tax and is not arbitrarily fixed as the due date of the return.

Finally, Treas. Reg. §301.6611-1(h)(2)(iv) implements the 1958 Congressional mandate that established the "mutuality of indebtedness" principle. As discussed above, Congress was clear that "mutuality of indebtedness arises" when "the overpayment and underpayment offset each other." S. Rpt. No. 1983, 85th Cong., 2nd Sess., 99 (1958), *reprinted in* 1958-3 C.B. 922, 1020. The Treasury Department reflected this Congressional intent in Treas. Reg. §301.6611-1(h)(2)(iv) by applying these same conventions to pre-1958 periods. The "mutuality of indebtedness principle" that underlies this regulatory provision, and the whole of section 6611(b)(1) itself, compels the conclusion that Marsh is entitled to overpayment interest until "[its] overpayment

and [the Government's] underpayment offset each other." That date, for the 1985 overpayment, is March 15, 1989.

B. The Federal Circuit's Decision Is Directly Contrary to the Principles Adopted by the Second Circuit in *Avon Products*.

The Federal Circuit's treatment of credit elect overpayments in this case is precisely opposite to the treatment of credit elect overpayments by the Second Circuit in *Avon Products*, *supra*. The Federal Circuit acknowledged the Second Circuit's holding that a credit elect overpayment could not be disregarded in the computation of underpayment interest under section 6601, but the Federal Circuit chose not to follow that principle because *Avon Products* "was an underpayment case." App., *infra*, 14a. The Federal Circuit's simplistic distinction is in error.

Rather than applying the controlling statutory provisions (sections 6402(a) and 6611(b)(1)) to the facts at hand, the Federal Circuit theorized that because a credit elect overpayment (such as Marsh's 1987 and 1988 credit elect overpayments) does not bear interest, such an overpayment should not be "counted" in determining overpayment interest on a non-credit elect overpayment (such as Marsh's 1985 and 1986 overpayments). *See* App., *infra*, 18a. In *Avon Products*, the Second Circuit held directly to the contrary with respect to underpayment interest. Specifically, the Second Circuit held that:

> Avon shifted part of its payments from its 1967 account to that for 1968. That *could not erase*, and Treas. Reg. §6611-1(h)(2)(vii) [one of the regulations barring interest on credit elect overpayments] *does not require us to ignore*, the hard fact that between June and September it had paid its 1967 taxes in full.

Id. at 346 (emphasis added). Contrary to *Avon Products*, the Federal Circuit did in fact "ignore" the "hard fact" that Marsh had fully paid its taxes over the disputed interest periods in this case. The Federal Circuit distinguished *Avon Products* as "an underpayment case" (App., *infra*, 14a) even though this Court has admonished that the overpayment and underpayment provisions of the Code are sections as to which "[e]quity demands" a comparable interpretive result. *United States v. Koppers Co.*, 348 U.S. 254, 267 (1955). The Federal Circuit's distinction between underpayment and overpayment interest is wholly unsupportable, and the Federal Circuit's decision is in conflict with the decision of the Second Circuit in *Avon Products*.

The Federal Circuit attempted to justify its departure from the Second Circuit's opinion in *Avon Products* by asserting that the Second Circuit "expressly distinguished the case before it from cases involving overpayment interest, and emphasized that the *statutory scheme* governing overpayment interest, as well as the *policy considerations underlying it*, were very different." App., *infra*, 16a (emphasis added). As support, the Federal Circuit cites the following passage from *Avon Products*:

> [T]his case is not covered by the cited *regulation* [*Treasury Regulation § 301.6611-1(h)(2)(vii)*, governing overpayment interest]. Nor do we believe that *it* provides a helpful analogy. Indeed, the fact that there is a *Treasury Regulation* explicitly denying the taxpayer interest in the [credit elect overpayment] situation . . . but nothing comparable suggesting that Avon must pay interest for its later-created deficiency would indicate that the contrary result is compelled.

App., *infra*, 16a (emphasis added) (*citing Avon Products*, 588 F.2d at 345).

The Federal Circuit's quotation misconstrues the actual holding in *Avon Products*. First, the quotation concerns the application of a regulation, and in no sense constitutes a comparative analysis of the "statutory scheme" governing overpayment interest and underpayment interest. Second, the quoted passage addresses only Treas. Reg. §301.6611-1(h)(2)(vii), which relates to the narrow topic of the prohibition of interest on credit elect overpayments, and does not speak to the computation of overpayment interest generally as alleged by the Federal Circuit. Third, the Second Circuit did not in the quoted passage (or elsewhere in its opinion) divorce overpayment interest and underpayment interest generally. The Second Circuit discussed Treas. Reg. §301.6611-1(h)(2)(vii) only to establish that it did not preclude the court from treating the credit elect overpayment as a payment of tax for the original overpayment year until such time as the overpayment was transferred to the subsequent tax year. The principle enunciated in *Avon Products* is that the denial of interest under Treas. Reg. §§ 301.6402-3(b)(5) and 301.6611-1(h)(2)(vii) on a credit elect overpayment *itself* does not prevent such overpayment from "counting" as a payment for purposes of determining interest on an underpayment. The same principle applies with equal force to the calculation of overpayment interest on amounts other than the credit elect overpayment *itself*.

The Federal Circuit's decision also departs from the "use of money" principle that underlies the result in *Avon Products* and the whole fabric of the computation of both overpayment interest and underpayment interest. This split is illustrated by the three possible outcomes for a taxpayer that has a subsequently determined "net" deficiency (*i.e.*, a deficiency after transferring to the subsequent year the "credit elect overpayment" amount) for a taxable year with respect to which the taxpayer originally had a credit elect overpayment:

Scenario 1. If the taxpayer does not have an overpayment for a prior year, the IRS will assess the tax and charge interest under section 6601(a) beginning on the date on which the credit elect overpayment was transferred to the subsequent tax year (in Marsh's case, March 15, 1989). This result is compelled by *Avon Products*, *supra*, and its progeny. *See May Dep't Stores v. United States*, 36 Fed. Cl. 680 (1996); Rev. Rul. 99-40, 1999-2 C.B. 441.

Scenario 2. If the taxpayer has an overpayment for a prior year, but the IRS does not elect to apply the overpayment against the underpayment, the IRS will assess the tax underpayment and charge interest under section 6601(a) beginning on the date the credit elect overpayment was transferred to the subsequent tax year (again, in Marsh's case, March 15, 1989). The IRS would also refund the taxpayer's prior year overpayment and pay interest to the taxpayer under section 6611(b)(2) through a date within 30 days of the date on which the overpayment is refunded.

Scenario 3. If the taxpayer has an overpayment for a prior year and the IRS chooses to apply that overpayment as a credit under section 6402(a) against the tax underpayment, under the Federal Circuit's opinion, the taxpayer will receive interest under section 6611(b)(1) on the prior year overpayment only up to the due date of the tax return for the year in which the tax underpayment arises (in Marsh's case, March 15, 1988).

Under the Federal Circuit's decision, the outcome in these scenarios depends upon the fortuity of whether the taxpayer has a prior year overpayment, and whether the IRS elects to credit that overpayment against the underpayment.

These disparate results cannot be reconciled with the overarching "use of money" principle that underlies the payment of both underpayment and overpayment interest. It is sensible that in scenario 1 above the taxpayer owes interest

starting on March 15, 1989, because that is the first date on which the taxpayer had the use of the government's money. The credit elect overpayment was a payment of 1987 taxes until such time as it was transferred to 1988 on March 15, 1989, which transfer gave rise to the tax underpayment for 1987.

Similarly, in scenario 2, it is appropriate for the taxpayer to owe interest on the same basis for the 1987 year, while collecting interest for the entire period that the government has the use of the taxpayer's money relating to the overpayment for the prior year (*e.g.*, 1985 in Marsh's case). Any potential "overlap" of a tax underpayment and a tax overpayment in this scenario would, of course, be rectified by the "interest netting" provision in section 6621(d).[11] This statutory netting rule further demonstrates the Congressional intent to equalize the amount of overpayment and underpayment interest when there is both a tax underpayment and a tax overpayment, Congressional intent is also satisfied by allowing overpayment interest to be "cut off" only when underpayment interest begins to accrue. The Federal Circuit's decision, if allowed to stand, would permit the IRS to exercise its unilateral crediting authority under section 6402(a) and effectively nullify the application of section 6621(d) in this, and similar, circumstances.

In scenario 3, the government has the use of the taxpayer's overpayment for the prior year up to the date on which the credit elect overpayment for 1987 is transferred to 1988 and the underpayment for 1987 first arises. That is the first date on which the IRS has the authority to apply the overpayment as a credit under section 6402(a), and the last date on which the government has the use of Marsh's

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[11] Section 6621(d), which became effective on July 22, 1998, creates a net interest rate of zero on tax overpayments and underpayments that overlap each other.

overpayment for 1985. Consistent with the "use of money" principle, Marsh should receive interest on the 1985 overpayment through the date on which it is credited to the 1987 tax year, *i.e.*, March 15, 1989. However, based on the Federal Circuit's opinion in this case and the Second Circuit's decision in *Avon Products*, Marsh had an *underpayment* on March 15, 1988 for purpose of calculating *overpayment interest* under section 6611(b)(1), but had an *overpayment on the same date, and for the next full year (until March 15, 1989)* for purposes of calculating *underpayment interest* under section 6601(a). This incongruous result flies in the face of the mandate of consistency in the computation of underpayment and overpayment interest established by this Court in *United States v. Koppers Co.*, 348 U.S. 254, 267 (1955). This result must be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 12, 2003

APPENDIX

APPENDIX A

No. 02-5002

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARSH & MCLENNAN COMPANIES, INC.
AND SUBSIDIARIES,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee

DECIDED: September 6, 2002,

Before MAYER, Chief Judge, MICHEL, and DYK, Circuit Judges.

DYK, Circuit Judge.

Marsh & McLennan Companies, Inc. ("Marsh") appeals the decision of the United States Court of Federal Claims granting summary judgment for the United States. The court held that Marsh is not entitled to interest on overpayments of federal income tax for 1985 and 1986 (which were applied to satisfy tax liabilities for 1987 and 1988) for the period after the due date of its 1987 and 1988 tax returns. Marsh & McLennan Cos. v. United States, 50 Fed. Cl. 140 (2001). Because the language of the pertinent statute, as authoritatively interpreted by a Treasury regulation, plainly denies such interest, we affirm.

BACKGROUND

The facts of this case are not in dispute. Marsh, a financial services company, overpaid its 1985 federal income

taxes by $275,139 ("1985 overpayment") and overpaid its 1986 taxes by $3,412,083 ("1986 overpayment").

Marsh also overpaid the amount of 1987 federal income taxes shown on the return by $12,694,216, and at the time the 1987 return was filed, Marsh elected to apply this overpayment to its 1988 tax liability ("1987 credit elect overpayment"). The Internal Revenue Service ("IRS") permits a corporate taxpayer that has paid more than its liability in one year to claim a credit for the excess against its estimated taxes for the succeeding year. 26 U.S.C. § 6402(b) (2000).[1] The credit is called a "credit elect overpayment." As discussed below, credit elect overpayments do not earn interest. The 1987 credit elect overpayment was transferred by the IRS from Marsh's 1987 tax account into its 1988 tax account on March 15, 1989, the due date of its 1988 tax return.

Marsh also overpaid the amount of 1988 taxes shown on the return by $28,336,308, and at the time the 1988 return was filed, Marsh elected to apply this overpayment to its 1989 tax liability ("1988 credit elect overpayment"). A portion of the 1988 credit elect overpayment was transferred by the IRS from Marsh's 1988 tax account into its 1989 tax account on September 15, 1989, to satisfy its estimated 1989

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[1] Section 6402(b) provides:

> The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

26 U.S.C. 6402(b) (2000).

The pertinent language of the code and regulations has not changed since the relevant time period.

tax liability, and the remainder of the 1988 credit elect overpayment was transferred from Marsh's 1988 tax account into its 1989 tax account on March 15, 1990, to satisfy its final 1989 tax liability.

Thus, Marsh had made four separate overpayments (if the 1987 and 1988 tax liabilities as shown in the returns were accurate): (1) the 1985 overpayment; (2) the 1986 overpayment; (3) the 1987 credit elect overpayment; and (4) the 1988 credit elect overpayment.

In 1994, the IRS determined that Marsh had in fact underpaid its 1987 taxes by $978,135. This increase in tax was less than the amount of the 1987 credit elect overpayment. The IRS applied Marsh's 1985 overpayment and a portion of its 1986 overpayment to its 1987 tax account on March 15, 1989, the date the 1987 credit elect overpayment was applied to Marsh's 1988 tax account.

Similarly, in 1994, the IRS determined that Marsh had in fact underpaid its 1988 taxes by $2,709,087. This increase in tax was less than the amount of the 1988 credit elect overpayment. The IRS applied the remainder of Marsh's 1986 overpayment to its 1988 tax account. The actual transfers were made on September 15, 1989 (the date the 1988 credit elect overpayment was applied to the estimated tax payment for 1989), and March 15, 1990 (the date the remainder of Marsh's 1988 credit elect overpayment was applied to Marsh's 1989 tax account).

There is no dispute concerning the amount of Marsh's 1985 and 1986 overpayments, the dates that those payments were credited to later years' taxes, the amount of the 1987 and 1988 credit elect overpayments, the dates on which those credit elect overpayments were needed to satisfy later years' obligations, or the amount of Marsh's 1987 and 1988 tax liabilities. The ultimate issue concerns the amount of interest due on the 1985 and 1986 overpayments.

An "overpayment" occurs when a taxpayer "has paid as an installment of the tax more than the amount determined to be the correct amount of such installment." 26 U.S.C. § 6403 (2000). The IRS has authority to either refund or credit the overpayment to any unpaid installment. Id. Unlike credit elect overpayments, overpayments bear interest. See id. § 6611(a). For the 1985 overpayment amount and the portion of the 1986 overpayment amount credited against Marsh's 1987 tax liability, the IRS allowed interest through April 15, 1988, the due date for Marsh's 1987 tax return (plus one month).[2] For the portion of the 1986 overpayment amount credited against Marsh's 1988 tax liability, the IRS allowed interest through April 15, 1989, the due date for Marsh's 1988 tax return (plus one month). The government stopped the running of interest on those dates because it reasoned that overpayment interest runs only until the "due date" of a taxpayer's federal income tax return for the year to which the overpayment was applied.

The governing statute, 26 U.S.C. § 6611 (2000), entitled "Interest on overpayments," provides in relevant part that "such interest shall be allowed and paid as follows: . . . In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken." Id. § 6611(b)(1). Treasury Regulation § 301.6611-1(h)(1) provides: "General rule. If an overpayment of tax is credited, interest shall be allowed from the date of the overpayment to the due date . . . of the amount against which such

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[2] Although the due date of corporate federal income tax returns is March 15 of the following year, 26 U.S.C. § 6072(b) (2000), the IRS computed and paid interest on Marsh's 1985 overpayment until April 15, 1988, rather than March 15, 1988. Similarly, the IRS computed and paid interest on Marsh's 1986 overpayment until April 15, 1989. The government concedes that the statute of limitations bars recovery of the interest attributable to the additional month, so it is not at issue on appeal.

overpayment is credited." 26 C.F.R. § 301.6611-1(h)(1) (2001). "Due date" is defined in subsection 301.6611-1(h)(2)(i): "In general. The term 'due date,' as used in this section, means the last day fixed by law or regulations for the payment of the tax (determined without regard to any extension of time) . . . ." Id. § 301.6611-1(h)(2)(i). For taxes reported on a return, this payment date is the last unextended date fixed for filing the return. 26 U.S.C. § 6151(a) (2000).

The parties apparently agree that, absent the credit elect overpayments, the two due dates involved here were March 15, 1988, and March 15, 1989 (i.e., the due dates for the 1987 and 1988 tax returns respectively) and that interest on the 1985 and 1986 overpayments would have ceased on those dates. Thus, the issue on appeal is the effect of the credit elect overpayments on the running of interest. It is well established that the taxpayer earns no interest on credit elect overpayments. If a taxpayer elects to credit against its estimated liability for one taxable year an overpayment shown on its return for the preceding year, it collects no interest even though at one point it has paid the IRS more than was due. 26 C.F.R. § 301.6611-1(h)(2)(vii) (2001); Martin Marietta Corp. v. United States, 216 Ct. Cl. 47, 572 F.2d 839, 841 (Ct. Cl. 1978). The question is whether credit elect overpayments must be taken into account in calculating the interest due on other overpayments.

PROCEEDINGS BELOW

Marsh filed a complaint in the Court of Federal Claims seeking $833,522 in overpayment interest for the period between April 15, 1988, and March 15, 1989, for its 1985 overpayment and a portion of its 1986 overpayment; for the period between April 15, 1989, and September 15, 1989, for a portion of its 1986 overpayment; and between April 15, 1989, and March 15, 1990, for the remainder of its 1986 overpayment, the ending dates representing the dates on which the credit elect overpayments were applied to

subsequent tax year liabilities. The government filed a motion for summary judgment, and Marsh filed a cross motion for summary judgment.

Marsh argued that 26 U.S.C. § 6611, which provides for the accrual of interest on overpayments "to the due date of the amount against which the credit is taken," should be construed to mean that interest runs until an account actually becomes deficient, that is, "due and unpaid." Marsh argued that its 1987 tax account was not actually deficient until March 15, 1989, when the 1987 credit elect overpayment was applied to its 1988 tax account. Similarly, Marsh argued that its 1988 tax account was not actually deficient until September 15, 1989, when a portion of its 1988 credit elect was applied to its 1989 estimated taxes, and on March 15, 1990, when the remainder of its 1988 credit elect was applied to its 1989 tax account.

The government argued that, under the plain meaning of section 6611 and Treasury Regulation § 301.6611-1(h)(2), the "due date of the amount against which the credit is taken" is the due date of a taxpayer's federal income tax return for the year to which the overpayment is applied. Marsh's 1985 overpayment and a portion of its 1986 overpayment were applied to its 1987 tax account, and the remainder of the 1986 overpayment was applied to Marsh's 1988 tax account. Marsh was required to file its 1987 tax return on March 15, 1988, and its 1988 tax return on March 15, 1989. Therefore, the government argued, Marsh was entitled to interest on its 1985 overpayment and a portion of its 1986 overpayment until March 15, 1988, and on the remainder of its 1986 overpayment until March 15, 1989.[3]

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[3] As noted, the government actually paid Marsh interest through April 15, 1988, and April 15, 1989.

The Court of Federal Claims recognized that the case turned on the interpretation of section 6611, and determined that, read in isolation, the statutory language, "which is, at best, not a model of clarity," does not "yield[] a satisfactory result." Marsh, 50 Fed. Cl. at 143. Similarly, the court concluded that neither the "use of money" principle, under which overpayments and underpayments are generally netted in calculating interest, nor IRS revenue rulings provided the answer. Id. at 143-45. The court then assessed the relative "predictability" of the parties' competing interpretations. Id. at 146. The court noted that Marsh's interpretation would make interest accrual cease on the date an overpayment was actually credited against another tax liability, and, under Marsh's interpretation, "the 'due date' becomes wholly dependent on the IRS's accounting procedures, which have not been shown to be governed by the statutory language of I.R.C. § 6611(b)(1)." Id. at 142. The court rejected Marsh's interpretation in large part because the "due date" would be impossible to predict in advance in that it depended on the "vagaries" of the IRS internal accounting procedures, and accepted the government's interpretation because it "harmonizes with the principle of predictability and comports with the statutory language." Id. at 146. Accordingly, the court granted summary judgment in favor of the government.

Marsh timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

STANDARD OF REVIEW

We review a trial court's grant of a motion for summary judgment without deference. Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1330 (Fed. Cir. 2001). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

DISCUSSION

This case involves the question when interest on tax overpayments ceases to run.

As noted above, the parties apparently agree that, if there had been no credit elect overpayment in 1987 or 1988, the "due date" for the additional tax due for 1987 and 1988 would have been March 15 of the year following the tax year in question, here March 15, 1988, and March 15, 1989. Under either party's interpretation of section 6611, interest on the 1985 and 1986 overpayments would have ceased to run on those dates.

The parties' disagreement arises from the existence of the 1987 and 1988 credit elect overpayments. Marsh argues that because of the credit elect overpayments, there was no outstanding liability in its 1987 account until the 1985 overpayment and a portion of the 1986 overpayment were applied to its 1988 tax account on March 15, 1989, and there was no outstanding liability in its 1988 account until the remainder of the 1986 overpayment was applied to its estimated 1989 tax on September 15, 1989, and its final 1989 tax on March 15, 1990.

Marsh urges that, as a result of its 1987 credit elect overpayment, it overpaid the government between the period of the credit elect overpayment and the due date of the tax return of the year to which the credit elect overpayment was applied, that is, from March 15, 1988, to March 15, 1989. Similarly, Marsh urges that, as a result of its 1988 credit elect overpayment, it overpaid the government from March 15, 1989, to September 15, 1989, and March 15, 1990.

Marsh contends that there was no payment "due" until its 1987 tax account actually became negative on March 15, 1989, i.e., the date that the 1987 credit elect overpayment was applied to its 1988 tax account. Similarly, Marsh

contends that there was no payment "due" until its 1988 tax account became negative on September 15, 1989, the date when a portion of its 1988 credit elect overpayment was applied to its 1989 tax account, and again on March 15, 1990, when the remainder of its 1988 credit elect overpayment was applied to its 1989 tax account.

The government urges that the "due date" for purposes of section 6611 is the due date of the returns, and that this date does not change as a result of the 1987 and 1988 credit elect overpayments.

We agree with the government and disagree with Marsh for several reasons.

First, the language of section 6611(b)(1), as interpreted by Treasury Regulation § 301.6611-1(h)(2), requires this result.

Both parties argue from their view of the supposed plain language of section 6611(b)(1). In fact, the statutory language is ambiguous. The "due date" could refer either to the due date of the return (the government's position) or the date on which there is a net deficit in the amount due in the taxpayer's account for the particular year (the taxpayer's position). Under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), we look to the Treasury regulations to resolve the ambiguity. See United States v. Mead Corp., 533 U.S. 218, 227-28, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001); United States v. Haggar Apparel Co., 526 U.S. 380, 392, 143 L. Ed. 2d 480, 119 S. Ct. 1392 (1999). The Treasury regulations are, we think, quite clear. They provide: "General rule. If an overpayment of tax is credited, interest shall be allowed from the date of the overpayment to the due date . . . of the amount against which such overpayment is credited," 26 C.F.R. § 301.6611-1(h)(1) (2001), and define "due date" as: "In general. The term 'due

date,' as used in this section, means the last day fixed by law or regulations for the payment of the tax (determined without regard to any extension of time)," id. § 301.6611-1(h)(2)(i). Marsh notes that because the regulations state that this definition of "due date" will be used "in general," they do not purport to interpret the entire phrase "due date of the amount against which the credit is taken" in section 6611(b)(1). As the government points out, however, Treasury Regulation § 301.6611 is actually keyed to the relevant section of the code, section 6611, indicating that it does in fact relate to section 6611. We agree with the government that the regulation does apply.

Marsh also contends that the regulations are "unreasonable." We cannot agree. For reasons that we discuss below, there is nothing unreasonable in disregarding credit elect overpayments in calculating overpayment interest. And, while an IRS interpretation of its regulation might be entitled to deference where there is an ambiguity, Am. Express Co. v. United States, 262 F.3d 1376, 1382 (Fed. Cir. 2001), Marsh cites no interpretation of the regulations by the IRS in a context similar to this one that would contradict their plain meaning.[4]

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[4] For example, Marsh cites Field Service Advice 200202056 (Oct. 11, 2001), available at 2001 FSA LEXIS 201 ("FSA 200202056"), to argue that the IRS interprets section 6611 as allowing interest until "the effective date on which the overpayment is credited against an outstanding liability." (Appellant's Reply Br. at 8-9.) FSA 200202056 involved whether the transfer of overpayments from taxpayer's year 1 and year 2 tax accounts into its year 9 tax account constituted a credit elect overpayment, which earns no interest, or an overpayment, which earns interest. The IRS ruled that "the transfer cannot constitute a credit elect . . . ," since the payment was not credited to the estimated taxes for the year immediately succeeding the tax year, and found that taxpayer was entitled to interest. FSA 200202056 at 7.

Contrary to Marsh's argument, the legislative history of section 6611 does not support Marsh. Section 6611 as it reads today was enacted in the Technical Amendments Act of 1958, Pub. L. No. 85-866, § 83, 72 Stat. 1606, 1663-64 (1958), reprinted in 1958 U.S.C.C.A.N. 1925, 1997, and is identical in relevant part to section 1019 of the Internal Revenue Act of 1924.[5] Marsh urges that the legislative history establishes that the "due date against which the credit is taken" is the date on which the overpayment is economically offset against a liability. Marsh argues that the legislative history reveals that "Congress intended that interest accrue on a credited overpayment until the date on which an overpayment and underpayment simultaneously existed (i.e., on the date on which 'mutuality of indebtedness' arose)," citing the Senate Finance Committee Report, S. Rep.

Similarly, Marsh cites Technical Advice Memorandum 9443007 (May 19, 1994), available at 1994 PRL LEXIS 1285, ("TAM 9443007") to argue that Treasury Regulation § 6611-1(h)(2)(i) was not intended to cut off interest on an overpayment on the filing date of a return when that date was prior to the date on which the taxpayer's liability arose. TAM 9443007 involved the question whether the accrual of overpayment interest allowable under section 6611, which is credited against a later deficiency resulting from an excessive refund, terminates on the date of the excessive refund or on the filing date for the year of the credit carryback that gave rise to the excessive refund. The IRS concluded that interest terminates on the date of the excessive refund.

[5] That section provided in part:

> Upon the allowance of a credit . . . of any sum which was excessive . . ., interest shall be allowed and paid on the amount of such credit . . . from the date such tax, penalty, or sum was paid . . . to the due date of the amount against which the credit is taken . . . .

Internal Revenue Act of 1924, § 1019, 43 Stat. 253, 346 (1924).

No. 1983, 85th Cong., 2d Sess., 234-35 (1958), reprinted in 1958-3 C.B. 922, 1156. But the legislative history on which Marsh relies does not address the precise issue here or suggest that a credit elect overpayment must be considered in calculating interest. In enacting and amending section 6611 and its predecessor, section 1019, Congress sought to address specific issues, such as: to eliminate the distinction between the running of interest in the situation where an overpayment is credited against a later-arising deficiency and where it is credited against an underpayment of original tax; to eliminate the running of interest where overpayments and underpayments offset each other; to address the anomaly in the transitional situation in which a taxpayer (which owed money to the government on taxes imposed by a prior revenue act) paid no interest but collected interest upon money the government owed it; and to eliminate the requirement of a protest as a condition precedent for a taxpayer to receive overpayment interest.[6] Thus, the

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[6] Rep. No. 1983, at 234-35 (1958), reprinted in 1958-3 C.B. 922, 1156 (explaining that "section 6611(b)(1) is amended to remove the distinction now existing in the running of interest where the overpayment is credited against an underpayment of original tax and where it is credited against an additional assessment. Interest on a credited overpayment would in either case now run only from the date of the overpayment to the original due date of the amount against which it is credited."); H.R. Rep. 775, at 45 (1957), reprinted in 1958-3 C.B. 811, 855; S. Rep. No. 1983, at 234-35, reprinted in 1958-3 C.B. 922, 1020-21 (eliminating interest on overlapping periods of underpayment and overpayment, thereby remedying situations where "even though underpayments and overpayments offset each other, the [IRS] collects more interest than it pays or the taxpayer is entitled to more interest than he owes the Government."); S. Rep. No. 52, at 38 (1926) (noting that "in the case of a credit taken against an additional assessment," and where the "taxes [were] imposed by acts prior to the revenue act of 1921, the taxpayer pays no interest in the case of underpayment up to the date of assessment," and that this leads to the problem that "a taxpayer who owes the

legislative history does not support Marsh's interpretation of the statute.

Second, contrary to Marsh's argument, section 6402(a) of the code does not require a different result. That section provides:

> In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), and (e) refund any balance to such person.

26 U.S.C. § 6402(a) (2000) (emphasis added). Marsh argues that there was no "liability" within the meaning of section 6402(a) until the credit elect overpayments were applied to subsequent years' taxes. Marsh points out that the IRS in fact did not apply the 1985 and 1986 overpayments to the 1987 tax account until the 1987 tax account actually became negative, that is, when the 1987 credit elect overpayment was transferred to the 1988 tax account on March 15, 1989. Similarly, the IRS did not apply the 1986 overpayment to the 1988 tax account until the 1988 tax account in fact became

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Government money, upon which he is paying no interest, is collecting interest upon money which the Government owes him."); H.R. Rep. No. 179, at 35 (1924) (regarding the elimination of the requirement of a protest as a condition precedent to the allowance of interest: "If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest during the period of their retention; and the fact of protest or a claim does not affect the merits of such interest payment.").

negative, that is, when the 1988 credit elect overpayment was transferred to pay 1989 estimated taxes on September 15, 1989, and the final 1989 taxes on March 15, 1990.

Section 6611 makes no reference to section 6402, and whatever limitations section 6402 may impose on the IRS's authority to credit, section 6402 does not define the term "due date" for purposes of section 6611. There is no indication in section 6402 that it was designed to affect the running of overpayment interest.

Third, Marsh argues that we should follow the Second Circuit's decision in Avon Products, Inc. v. United States, 588 F.2d 342 (2d Cir. 1978), which Marsh interprets as holding that there is no tax liability until the credit elect overpayments were in fact credited to later years' taxes. Avon is distinguishable and does not stand for the broad proposition attributed to it by Marsh. In Avon the taxpayer initially reported an overpayment on its 1967 return, and made a credit elect. 588 F.2d at 343. Thereafter, it filed an amended return showing a 1967 deficiency, and the IRS later assessed an additional 1967 deficiency. Id. The IRS assessed interest on the deficiencies without regard to the credit elect overpayment. Id. The Second Circuit held that this was impermissible, and that the credit elect overpayment could not be disregarded; interest on the deficiencies did not run until the date the credit elect overpayment was applied to the next year's tax. Id. at 344. Marsh argues that the same should be true here, and that the amount of the deficiencies should be offset by the amount of the credit elect overpayments.

However, Avon was an underpayment case, interpreting the section of the statute governing underpayment interest, section 6601(a). That section provides "If any amount of tax . . . is not paid on or before the last date prescribed for payment, interest on such amount . . . shall be paid for the period from such last date to the date paid." 26 U.S.C. §

6601(a) (2000) (emphasis added). Unlike the situation here, the language of the statute contradicted the government's position since the statute focused on the question whether the tax was "paid," and not on the "due date" for the tax. As the Second Circuit noted, "if we were to construe § 6601(a) literally, it would not even be apposite to this case. Avon's full tax was in fact paid 'on or before the last date prescribed for payment,' June 15, and so the premise of the provision is undercut." Avon, 588 F.2d at 344. To avoid a result clearly contrary to the statutory language, the court interpreted section 6601(a) as providing that underpayment interest shall begin running when a tax becomes "both due and unpaid." Id.

As the Avon court noted, the tax code differentiates between underpayment and overpayment interest situations. Id. at 345. It does not, as Marsh argues, require identical treatment.[7] Underpayment interest ceases to run on "the date paid," 26 U.S.C. § 6601(a) (2000), while overpayment interest ceases to run on "the due date of the amount against which the credit is taken," id. § 6611(b). Thus, cases like Avon interpreting the section of the statute governing underpayment interest situations are irrelevant. See also May Dep't Stores Co. v. United States, 36 Fed. Cl. 680, 688 (1996) (holding that the government was not entitled to underpayment interest between the date of payment of the estimated tax and the date of filing of the return where the

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[7] Marsh cites Consolidated Paper Co. v. United States, 75 Ct. Cl. 215, 59 F.2d 281 (Ct. Cl. 1932), cert. denied, 288 U.S. 615, 77 L. Ed. 988, 53 S. Ct. 506 (1933), as evidence of Congress's intent to treat all overpayments identically, whether they are ultimately refunded or credited. Consolidated Paper involved a technical statute of limitations issue concerning the date that a credit was allowed and taken by the Commissioner. It has no relevance here.

taxpayer overestimated its overpayment and elected to apply the overpayment to the following year's estimated tax as a credit elect, thereby creating a deficiency); Revenue Ruling 99-40, reprinted in 1999-2 C.B. 441 (analyzing the calculation of underpayment interest in the context of a credit elect overpayment and subsequently determined deficiency). Moreover, the court in Avon expressly distinguished the case before it from cases involving overpayment interest, and emphasized that the statutory scheme governing overpayment interest, as well as the policy considerations underlying it, were very different:

> [T]his case is not covered by the cited regulation [Treasury Regulation § 301.6611-1(h)(2)(vii), governing overpayment interest]. Nor do we believe that it provides a helpful analogy. Indeed, the fact that there is a Treasury Regulation explicitly denying the taxpayer interest in the [credit elect overpayment] situation . . . but nothing comparable suggesting that Avon must pay interest for its later-created deficiency would indicate that the contrary result is compelled.

Avon, 588 F.2d at 345.

To support its argument that there is symmetry in the payment of overpayment and underpayment interest, Marsh cites a section of the code that equalizes underpayment and overpayment interest rates, 26 U.S.C. § 6621(d) (2000). But the issue here is the running of interest, not what interest rate applies. Marsh also cites Brown & Williamson, Ltd. v. United States, 231 Ct. Cl. 413, 688 F.2d 747, 750 (Ct. Cl. 1982), and United States v. Koppers Co., 348 U.S. 254, 267, 99 L. Ed. 302, 75 S. Ct. 268, 130 Ct. Cl. 829 (1955), for the same proposition. Brown & Williamson involved the amount of overpayment interest that should be paid on a refund resulting from a retroactive reduction of taxes by an income tax treaty. Brown & Williamson, 688 F.2d at 750. Koppers

involved the calculation of interest under a provision allowing abatement of wartime excess profits taxes. Koppers, 348 U.S. at 267. Neither Brown & Williamson nor Koppers is helpful here.

Fourth, Marsh argues that the government had the use of its money and should pay interest. We agree that the IRS had the use of Marsh's money represented by the credit elect overpayments, and that Marsh will not receive interest on those amounts. However, this is not an anomaly. Once the taxpayer designates an overpayment as a credit elect overpayment, the taxpayer loses control over that money. Once the election is made, that election is irrevocable and binding on both the IRS and the taxpayer. Martin Marietta, 572 F.2d at 842. The regulations expressly provide that interest shall not be allowed on credit elect overpayments under section 6611(a). 26 C.F.R. § 301.6611-1(h)(2)(vii) (2001);[8] Martin Marietta, 572 F.2d at 841. Marsh does not contest this principle, and admits that "this exception is set forth in Treas. Reg. §§ 301.6402-3(a)(5) and 301.6611-1(h)(2)(vii), and was ratified by Congress."[9] (Appellant's

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[8] Treasury Regulation § 301.6611-1(h)(2)(vii) provides:

> Estimated income tax for succeeding year. If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof.

26 C.F.R. § 301.6611-1(h)(2)(vii) (2001) (emphasis added).

[9] See H.R. Rep. No. 98-432, pt. 2, at 1490 (1984) ("The taxpayer may elect to credit the overpayment to an estimated tax payment . . . . Where the credit is made to an estimated tax payment arising prior to the election, interest on any overpayment will not be payable . . . ." (citing Treas. Reg. § 301.6611-1(h)(2)(vii))).

Reply Br. at 27 n.14.) Just as the taxpayer cannot get interest on the credit elect overpayment, the taxpayer cannot use the credit elect overpayment to increase the amount of interest that otherwise would be due on the 1985 and 1986 overpayments.

In any event, the "use of money" cases, on which Marsh so heavily relies, cannot contradict the statutory language as interpreted by the regulation. In general, the "use of money" principle is a tool of statutory construction that supports the payment of interest to compensate one party for the time the other party had the use of its money. See, e.g., Manning v. Seeley Tube & Box Co., 338 U.S. 561, 565-66, 94 L. Ed. 346, 70 S. Ct. 386 (1950). The use of money principle has been recognized by the IRS generally,[10] and has been applied by the statute and the regulations in specific situations.[11] But

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[10] See Field Serv. Adv. 200149028 (Sept. 7, 2001), available at 2001 FSA LEXIS 188, 2001 WL 1559040 ("Compensation for the use of money is the principal rationale for charging interest with respect to both overpayments and underpayments."); Tech. Adv. Mem. 973005 (April 7, 1997), available at 1997 PRL LEXIS 591, 1997 WL 415375 (discussing section 905(c) as "a special exception to the general interest rules" relating to foreign tax credit: "the Code's interest provisions reflect the economic basis for interest, i.e., use of money . . . under § 6611, the government pays the taxpayer interest on an overpayment for the time the government has use of the taxpayer's money."); Rev. Proc. 60-17, § 2.01, reprinted in 1960-2 C.B. 942, 943 ("Under the general rule, interest is paid on a tax overpayment for the time the government has the use of the taxpayer's money. . . . The underlying objective is to determine in a given situation whose money it is and for how long the other party had the use of it.").

[11] See 26 U.S.C. § 6601(f) (2000) ("No interest shall be imposed under [the underpayment interest provision] on the portion of the tax [satisfied by credit of an overpayment] for any period during

Marsh has not called our attention to any case in which the use of money principle has been held to override statutory language requiring a contrary result. See MNOPF Trustees, Ltd. v. United States, 123 F.3d 1460, 1465 (Fed. Cir. 1997) (determining the starting date for interest on an overpayment attributable to a refund to be the unextended date by which the banks that withheld the money were required to file returns reporting the withholding, based on the relevant Treasury regulation, rather than from the date that the government actually had "use of" the funds); May Dep't Stores, 36 Fed. Cl. at 688 (reaffirming the Avon principle that underpayment interest may be imposed only for the period during which a tax is both due and unpaid, based on "the plain language" of section 6601); Avon, 588 F.2d at 343-44 (recognizing the use of money principle as a background principle, then interpreting section 6601 as required by the statutory language and legislative history). The use of money principle does not trump the language of the relevant statute and Treasury regulations.

Finally, Marsh argues that if it had sought a refund instead of making the credit elect in 1987, it would have had the use of those funds. This is true enough, but we fail to see how that assists Marsh. There is no principle that requires

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which, if the credit had not been made, interest would have been allowable with respect to such overpayment."); Id. § 6621(d) ("To the extent that, for any period, interest is payable . . . and allowable . . . on equivalent underpayments and overpayments by the same taxpayer . . . the net rate of interest under this section on such amounts shall be zero for such period."); 26 C.F.R. § 301.6611-1(h)(2)(vi) (2001) ("In the case of a credit against an additional amount, addition to the tax, or assessable penalty, the due date is the earlier of the date of assessment or the date from which such amount would bear interest if not satisfied by payment or credit.").

that the taxpayer be treated the same whether it seeks a refund or a credit elect. Indeed, the statute as interpreted by the regulations provides that, for a refund, interest will be allowed from the date of the overpayment until "a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days," 26 U.S.C. § 6611(a)(2) (2000), but denies interest on credit elect overpayments, 26 C.F.R. § 301.6611-1(h)(2)(vii) (2001). The taxpayer could have sought a refund for the excess funds, or left the excess funds as an interest-bearing overpayment. A taxpayer that makes a credit elect has no one to blame but itself for the non-payment of interest on that amount. See Avon, 588 F.2d at 345. See also Mellon Bank, N.A. v. United States, 265 F.3d 1275, 1281-82 (Fed. Cir. 2001) ("The Supreme Court has 'observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not . . . .'" (quoting Comm'r v. Nat'l Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 149, 40 L. Ed. 2d 717, 94 S. Ct. 2129 (1974))).

In essence, Marsh urges that we interpret the statute to achieve what it regards as a more just result. But we cannot revise the language of the statute as interpreted by the Treasury to achieve what might be perceived to be better tax policy, just as we cannot approve the Court of Federal Claims' decision below interpreting the code to achieve greater predictability. The tax code is complex, see generally Cheek v. United States, 498 U.S. 192, 199-200, 112 L. Ed. 2d 617, 111 S. Ct. 604 (1991), and we must be careful to enforce the statute as written and interpreted, see Philadelphia & Reading Corp. v. United States, 944 F.2d 1063, 1074 (3d Cir. 1991) ("The precision and complexity of our tax laws . . . bespeak Congress's intent to keep the Article III judiciary out of the administration of the tax code except to enforce and monitor the precise rules Congress has written . . . ."). It is noteworthy that some of the very cases on which Marsh relies recognize that the tax code interest

provisions are not to be interpreted, contrary to their language, to require the favorable netting of overpayments and underpayments that Marsh urges is essential to tax equity. See Seeley Tube, 338 U.S. at 565-66 (declining to offset deficiency by loss carry-back for interest purposes); N. States Power Co. v. United States, 73 F.3d 764, 768 (8th Cir. 1996), cert. denied, 519 U.S. 862, 136 L. Ed. 2d 110, 117 S. Ct. 168 (1996) (holding that, in calculating interest, overpayments and underpayments need not be netted to avoid interest rate differential).

We have considered the taxpayer's other arguments, and find them to be without merit.

COSTS

No costs.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-205T
(Filed August 6, 2001)

MARSH & McLENNAN COMPANIES, INC. and SUBSIDIARIES,[1]

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Neal J. Block, Chicago, IL, for plaintiff. A. Duane Webber, Baker & McKenzie, Washington, DC, of counsel.

W.C. Rapp, Washington, DC, with whom was Acting Assistant Attorney General Claire Fallon, for defendant.

OPINION

MILLER, Judge.

This case is before the court after argument on cross-motions for summary judgment. The issue for decision is

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[1] Despite defendant's contention that the spelling of the case name on the complaint is immutable, the court granted plaintiff's motion to change the style of the caption to reflect the accurate spelling of plaintiff.

whether the taxpayer is entitled to interest on overpayments of federal income tax for 1985 and 1986 to the date on which each overpayment was applied to satisfy a later-arising liability or to the date on which the tax was due for the year generating the liability.

FACTS

The facts are not disputed. Marsh & McLennan Co., Inc. ("plaintiff"), overpaid its 1985 federal income taxes by $275,139.00 (the "1985 Overpayment") and overpaid its 1986 federal income taxes by $3,412,083.00 (the "1986 Overpayment"). The 1985 Overpayment eventually was credited to plaintiff's 1987 tax liability. This credit was reflected in an Internal Revenue Service ("IRS") Transcript which was generated on April 11, 1994 (the "Transcript"). The Transcript shows that interest on the 1985 Overpayment was computed using an ending date of April 15, 1988. The credit itself was not applied to the 1987 tax liability until March 15, 1989. Plaintiff asserts that its 1987 tax account did not go into "debit" status until March 15, 1989. Plaintiff claims that it was this date (March 15, 1989) that should have been the ending date for the calculation of interest on the 1985 Overpayment.

Similarly, the 1986 Overpayment was credited to plaintiff's 1988 tax liability. The Transcript reveals that interest on the 1986 Overpayment was computed using two end dates: April 15, 1988, for the amount of the 1986 Overpayment credited to the 1987 account and April 15, 1989, for the amount of the 1986 Overpayment offset to the 1988 account. Plaintiff again takes the position that its 1988 tax account did not go into "debit" status until September 15, 1989. It is this date that plaintiff designates for calculating interest on $1,074,541.00 of the 1986 Overpayment. Plaintiff's 1988 tax account again went into "debit" status on March 15, 1990, on which date the remaining portion of the 1986 Overpayment was credited to the 1988 tax account.

According to plaintiff, interest should have been calculated to September 15, 1989, and March 15, 1990, for the respective amounts of the 1986 Overpayment, whereas defendant holds that the April 15 ending dates for the calculation of interest are proper.[2]

DISCUSSION

1. Summary judgment

Summary judgment is proper when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. See RCFC 56(c). The parties agree on the amounts of income tax overpayments for 1985 and 1986, the taxable years to which the overpayments were applied, and the date on which the accrual of allowable interest on the overpayment begins under section 6611 of the Internal Revenue Code. See 26 U.S.C. ("I.R.C.") § 6611(b)(1) (2000). The only issue before the court is the date on which the accrual of allowable interest ends.

2. Ending date for interest on overpayments

"Tax and interest payments are creatures of statute, and such statutory provisions are to be given their plainest reasonable meaning, in implementation of the discernable intent of Congress." Shriners Hospital for Crippled Children v. United States, 862 F.2d 1561, 1563 (Fed. Cir. 1988) (footnote omitted).

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[2] Defendant actually argues that the ending dates should have been one month earlier, *i.e.*, March 15, for each of the respective years, and that plaintiff has received excess interest payments, see Def.'s Br. filed Dec. 6, 2000, at 4 n.3. However, defendant acknowledges that the statute of limitation bars recovery of any overpayment.

I.R.C. § 6611, entitled "Interest on Overpayments," provides as follows:

> (b) Period.--Such interest shall be allowed and paid as follows:
>
> > (1) Credits.--In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken.

In advancing their respective interpretations of the phrase "due date of the amount against which the credit is taken," both parties ground their arguments on the plain meaning of the statutory language.

Defendant focuses on the "due date" in I.R.C. § 6611(b)(1), arguing that "due date" is a term defined by Treas. Reg. § 301.6611-1(h)(2) (as amended in 1994), as "the last day fixed by law or regulation for the payment of the tax (determined without regard to any extension of time)." Corresponding with this definition, defendant posits that the "due date" for overpayment of interest is the original due date of the return for the period to which the overpayment amount was credited. For corporate, calendar-year taxpayers like plaintiff, that date is the 15th day of March following the close of the calendar year. I.R.C. § 6072(b). Defendant implores the court to "do what the statute says," Transcript of Proceedings, Marsh & McLennan Co. v. United States, No. 00-205T, at 24 (June 19, 2001), and import into I.R.C. § 6611(b)(1) the "due date" definition derived from the Treasury Regulation.

Plaintiff rejoins that Treas. Reg. § 301.611-1(h)(2) only provides that "in general" the term "due date" means "the last day fixed by law or regulation for the payment of tax (determined without regard to any extension of time) and not the date on which . . . [the IRS] makes demand for the payment of the tax." Plaintiff argues that the latter portion of the Treasury Regulation (which defendant failed to quote)

indicates that section 301.611-1(h)(2) is concerned primarily with distinguishing between (i) the date on which tax is due and (ii) the date on which the IRS notifies the taxpayer that the tax is due. Reading section 301.611-1(h)(2) as only a general rule, plaintiff dismisses it as not purporting to apply to the situation at hand.

The underlying flaw in defendant's reliance on the Treasury Regulation and I.R.C. § 6072(b) is the explicit language contained in the statute. Given the existence of I.R.C. § 6072(b), it is manifest that Congress knew how to define "due date" as the 15th day of March following the close of the taxable year. Had Congress intended such a result with respect to the ending date for overpayment interest, it could have chosen explicit language to do so and included that language in I.R.C. § 6611(b)(1). More importantly, according to plaintiff, defendant's focus on "due date" ignores the remainder of the statutory language in I.R.C. § 6611(b)(1) which requires interest to the "due date of the amount against which the credit is taken."

Plaintiff's reliance on the plain language of I.R.C. § 6611(b)(1) suffers from a similar infirmity. Plaintiff focuses on one short phrase taken from I.R.C. § 6611(b)(1) -- in this case "the amount against which the credit is taken." Plaintiff argues that Treas. Reg. § 301.611-(h)(2), is concerned with the "due date of the return," not the "due date of the amount." Plaintiff reasons that there can be no "amount" against which the overpayment credit is taken until the IRS determines that an amount is due and unpaid. The IRS determined in this case that an amount was due and unpaid on the due date of the return against which the credit was applied. It is the actual date on which the credit amount was applied to a tax liability, i.e., when the account went into "debit" status, that plaintiff argues is the "due date" under

I.R.C. § 6611(b).[3] Plaintiff also links this argument to another provision of the Internal Revenue Code -- I.R.C. § 6402(a), which authorizes the IRS to credit an overpayment of one tax liability, including interest allowed thereon, "against any liability in respect of an internal revenue tax on the part of the person who made the overpayment." Because I.R.C. § 6402(a) authorizes the overpayment credit and the language itself predicates the overpayment credit on the existence of an outstanding "liability," plaintiff construes this provision as supporting its position.

Both parties wrest too much congressional intent from a snippet of statutory language. Plaintiff's argument ignores the remainder of the cited phrase. Plaintiff seeks to interpret "amount against which the credit is taken" without full regard to the phrase "due date." Under plaintiff's argument, the "due date" becomes wholly dependent on the IRS's accounting procedures, which have not been shown to be governed by the statutory language of I.R.C. § 6611(b)(1). In fact, I.R.C. § 6611(b)(1) does not instruct when the "amount against which the credit is taken" becomes "due." That the statute concerned with the timing of overpayment interest would be silent as to when that overpayment interest ended is a peculiar circumstance. Plaintiff cannot point to any clear congressional intent for such an unpredictable result, instead seeking to minimize the impact of the phrase "due date." However, a plain-meaning interpretation that discounts part of the language it purports to interpret is untenable. "Statutory interpretation is a 'holistic endeavor' that requires consideration of a statutory scheme in its entirety." Vectra Fitness, Inc. v. TNWK Corp., 162 F.3d 1379, 1383 (Fed. Cir.

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[3] In the instant case, the date on which the 1985 overpayment credit was applied to an outstanding tax liability is March 15, 1989. The 1986 overpayment credit was applied to two separate outstanding tax liabilities on September 15, 1989, and March 15, 1990.

1998) (quoting United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988)). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ." United Sav., 484 U.S. at 371.

The parties' arguments, purblind as they may be, represent polar efforts at interpreting statutory language which is, at best, not a model of clarity, and neither interpretation yields a satisfactory result. In this instance the court turns to other available tools of statutory interpretation.

3. The "use of money" principle

Plaintiff claims that the "cornerstone" of the Internal Revenue Code's interest provisions is the "use of money" principle. Pl.'s Br. filed Feb. 5, 2001, at 12. Interest is charged to compensate one party for the time the other party had the use of its money. See, e.g., Manning v. Seeley Tube & Box Co., 338 U.S. 561, 565-66, 94 L. Ed. 346, 70 S. Ct. 386 (1950). Although both parties agree that the "use of money" principle is a tool that can be used to interpret a statutory requirement, they differ sharply as to the extent to which the principle should be applied in the case at bar.

Plaintiff relies primarily on Avon Products, Inc. v. United States, 588 F.2d 342, 343 (2d Cir. 1978), and May Department Stores Co. v. United States, 36 Fed. Cl. 680 (1996), to establish the "use of money" principle as the underlying concept behind the granting of interest on overpayments. The taxpayer's liability in Avon Products had been paid fully on the due date for payment, but subsequently became unpaid. Because the taxpayer was required to pay interest on this deficiency under I.R.C. § 6601, the court in Avon Products was concerned with determining when this interest should start to run: on the original due date for payment or on the date the liability subsequently became unpaid. The court settled on the latter date, holding that

I.R.C. § 6601 imposes interest "when a tax becomes both due and unpaid." Avon Products, 588 F.2d at 344. Although the court did not explicitly tie this analysis to the "use of money" principle, plaintiff argues that the decision reaffirms the principle by holding that interest "is intended only to compensate the Government for delay in payment of a tax." Id. at 343.

Similarly, May Department Stores was concerned with the amount of interest owed by a taxpayer which originally filed returns reporting overpayments for the taxable years 1983 and 1984, but subsequently was found to be deficient with respect to those years. The Court of Federal Claims held that, at least with respect to interest owed on a tax deficiency under I.R.C. § 6601, "absent a clearly expressed legislative intent to the contrary, this court must ordinarily regard the plain language of the statute as conclusive." May Dep't Stores, 36 Fed. Cl. at 688. The court concluded that interest was due from the date that the taxpayer's payment was deficient. The court specifically addressed the "use of money" principle, holding that "consistent with the 'use of money' principle followed in both Manning and Avon Products, interest on deficiencies may be charged to compensate the government for funds which it did not possess but which it rightfully should have possessed." Id. at 689 (footnote omitted).

These cases establish the "use of money" principle, but, as defendant cogently argues, they do so while interpreting a provision of the Internal Revenue Code that is not at issue in this case (I.R.C. § 6601), and deal with deficiency (or underpayment) interest, not overpayment interest. On these grounds defendant discounts the "use of money" principle as the guide to determining the ending date for overpayment interest.

While these cases are distinguishable, they cannot be dismissed out of hand. This is especially true because "the

Supreme Court has stressed the importance of symmetry in the payment of interest." Brown & Williamson, Ltd. v. United States, 231 Ct. Cl. 413, 688 F.2d 747, 750 (Fed. Cir. 1982) (citing United States v. Koppers Co., 348 U.S. 254, 267, 99 L. Ed. 302, 75 S. Ct. 268 (1955); Manning, 338 U.S. at 568). Moreover, in Brown & Williamson, the Government based its position regarding the overpayment of interest on the "use of money" principle.

In Brown & Williamson the taxpayer, a foreign corporation, had withheld income tax from 1975 to 1978 at a withholding rate of 15%. This rate satisfied the tax liability owed at that time. Pursuant to a treaty effective April 25, 1980, the tax rate was reduced to 5%. The reduced tax rate was made effective as of January 1, 1975. Taxpayer accordingly sought and received refunds of almost $17.5 million for the years 1975 to 1978. Taxpayer also sought interest from the original date of payment of the refunded taxes. The IRS ruled that interest was due from the date the treaty went into effect. Thus, the Federal Circuit was required to interpret the "date of overpayment" in I.R.C. § 611(b)(1).

The Federal Circuit relied on the past practice of the IRS, the applicable Treasury Regulation, and the discernable congressional intent to conclude that the "date of overpayment" was "the date on which [the refunded tax] originally was paid." Brown & Williamson, 688 F.2d at 749. Defendant argued against this conclusion, positing that "interest is payment for the use of money that [the Government] has in effect borrowed from someone else and that if the possession of the money was valid, interest on it is not due when the money is refunded because of a subsequent event." Id. at 750. Had the Federal Circuit adopted this reasoning, this court's inquiry would be at end. However, the Federal Circuit formulated the issue as "involving the wholly different question of a taxpayer's right to recover interest upon taxes that initially were properly paid but that

were refunded as a result of a subsequent retroactive change in the tax law." Id. at 751. Nevertheless, Brown & Williamson, like the other cases offered by the parties, is revelatory by way of analogy.

The Federal Circuit noted that "when Congress intends to deny interest on refunds, it explicitly so provides." Id. at 749. Although the instant case does not concern a refund, this point is well taken. Defendant cannot point to an explicit denial of interest after a given date in I.R.C. § 6611(b)(1). Furthermore, defendant's out-of-hand rejection of the "use of money" principle in this case is tempered by the position that it took in Brown & Williamson.[4]

Ultimately, however, an examination of the cases applying the "use of money" principle leads to the conclusion that it should play no decisive role in this case.

In Martin-Marietta Corp. v. United States, 189 Ct. Cl. 291, 418 F.2d 502 (1969), the United States Court of Claims discussed the "use of money" principle and attempted to evoke a guiding rationale for its application. The court began with Manning, an underpayment interest case, noting that it "involved the question of whether interest on a properly assessed tax deficiency is abated when the deficiency itself is extinguished by the carryback of a net operating loss sustained in a subsequent year." Martin-Marietta, 189 Ct. Cl. at 303, 418 F.2d at 508. The Supreme Court in Manning decided that the taxpayer was not entitled to a refund of the assessed interest, reasoning:

> From the date the original return was to be filed until the date the deficiency was actually assessed,

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[4] Taken together, the above described cases demonstrate that the only rationale that informs the IRS's approach to the "use of money" principle is the maximization of tax revenue.

> the taxpayer had a positive obligation to the United States: a duty to pay its tax. For that period the taxpayer, by its failure to pay the taxes owed, had the use of funds which rightfully should have been in the possession of the United States.

Manning, 338 U.S. at 565-66 (citations omitted). Interpreting this language, the Court of Claims in Martin-Marietta focused on the "operational events" creating tax liability. Martin-Marietta, 189 Ct. Cl. at 304, 418 F.2d at 508. The court concluded that the factual "operational events" in Manning had given rise to a tax obligation to the Government. Thus, the Government had the right to the use of those funds used to pay the tax obligation. This right remained notwithstanding a later adjustment to the tax obligation that eliminated the obligation itself. The conclusion followed because "the operational fact pattern necessary to fix the taxpayer's liability already was complete." Id., 189 Ct. Cl. at 303-304, 418 F.2d at 508.

The Court of Claims contrasted the Manning situation with that of the claimant in Martin-Marietta. In Martin-Marietta the court allowed the taxpayer interest on its overpayments, because no "operational events" had given the Government the right to the funds. Instead, it was not until an administrative decision subsequent to the overpayment year that the question of the taxpayer's liability was decided. Thus, the Government could not claim that it had the legal right to the "use of" the taxpayer's overpayment funds. Id., 189 Ct. Cl. at 304, 418 F.2d at 508-509.

These cases establish that the "use of money" principle cannot be applied as broadly as plaintiff advocates. In both Manning and Martin-Marietta, the courts were focused on whether the Government had a right to use the taxpayer's funds. The Martin-Marietta court answered this question by examining when the liability to the Government arose. In the instant case, no such analysis can be undertaken as this case

involves an overpayment that the IRS admittedly had the right to retain. While Manning and Martin-Marietta deal with the "use of money" principle generally, attempting to apply their operational events analysis does not advance resolution of plaintiff's claims.

Plaintiff has painted its "use of money" argument with a broad stroke, arguing that the principle is the cornerstone of the tax code. Such an approach obscures the fact that the "use of money" principle has not been applied to fixing the end date for the calculation of overpayment interest. The court cannot base a ruling under I.R.C. § 6611(b)(1) on the "use of money" principle when neither the relevant caselaw nor the plain language of the statute supports plaintiff's argument.

4. Other tools of statutory interpretation

Both parties offer IRS Revenue Rulings in support of their respective positions. The Federal Circuit has held that Revenue Rulings have no binding effect on the Court of Federal Claims. B.F. Goodrich Co. v. United States, 94 F.3d 1545, 1550 n.5 (Fed. Cir. 1996); Pacific Far East Line, Inc. v. United States, 211 Ct. Cl. 71, 93, 544 F.2d 478, 490 (1976). Revenue Rulings are not accorded a presumption of correctness, but must be analyzed for consistency with the statute. Estate of Sanford v. Commissioner, 308 U.S. 39, 52-54, 60 S. Ct. 51, 84 L. Ed. 20 (1939); United States v. Missouri Pac. R.R., 278 U.S. 269, 280, 73 L. Ed. 322, 49 S. Ct. 133 (1929). However, "they are entitled to some consideration and carry some weight, especially when the statutory language is considered ambiguous." Farmar v. United States, 231 Ct. Cl. 642, 655 n.12; 689 F.2d 1017, 1024 n.12 (1982), rev'd on other grounds, C.I.R. v. Engle, 464 U.S. 206, 78 L. Ed. 2d 420, 104 S. Ct. 597 (1984); Gino v. Commissioner, 538 F.2d 833, 835 (9th Cir.), cert. denied, 429 U.S. 979, 50 L. Ed. 2d 587, 97 S. Ct. 490 (1976).

Unfortunately, the cited Revenue Rulings do little to shed light on the statutory language.

Plaintiff relies on Revenue Ruling 99-40, 1992-2 C.B. 441, 1999 IRB LEXIS 371, which dealt with calculating deficiency (or underpayment) interest when the taxpayer elects to apply an overpayment of tax for one year to the following year's estimated taxes (a "credit elect"). The Revenue Ruling is concerned with "the manner in which interest on a subsequently determined deficiency is computed under [I.R.C.] § 6601(a) when the taxpayer makes an election to apply an overpayment to the succeeding year's estimated taxes." Id. at *9. Underpayment interest calculated under I.R.C. § 6601(a) is not at issue in this case and the cited ruling cannot be analyzed for consistency with I.R.C. § 6611(b)(1).[5]

Defendant's reliance on Revenue Rulings is similarly unhelpful, as those cited merely establish the statutory history that served as a backdrop for Avon Products. As explained above, that case also dealt with the interpretation. I.R.C. § 6601. Defendant points out that the court "rejected the intricacies of the multiple Revenue Rulings" in May Department Stores. Def.'s Br. filed May 4, 2001, at 17.

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[5] Plaintiff also relies on a Technical Advice Memorandum (Priv. Ltr. Rul. 94-43-007 (May 19, 1994), 1994 PRL LEXIS 1285), and two other private letter rulings to support an application of underpayment interest principles to the overpayment sphere. However, pursuant to I.R.C. § 6611(k)(3), written determinations of the IRS, including private letter rulings, technical advice memoranda, and other determination letters, may not be cited as precedent. Plaintiff's reliance on Field Service Advice letters is also misplaced, as these letters are fact specific and clearly state that they are "not to be relied upon or otherwise cited as precedent." 1993 FSA LEXIS 155, 1 (Sept. 23, 1993).

Thus, these Rulings are of no help in interpreting I.R.C. § 6611(b)(1).

Faced with a dearth of caselaw or applicable IRS rulings, the court fashions a decision which most comports with the statutory language and adheres to an acceptable guiding rationale. Defendant's position that the "due date of the amount against which the credit is taken" means the "due date" for the tax of the year in which the credit is taken comports more closely with the language of I.R.C. § 6611(b)(1) than does plaintiff's. Plaintiff's interpretation of "due date" would first extract "the amount against which the credit is taken" from the rest of the provision and then add the words "due and unpaid" to describe that amount. This reading would require the IRS to calculate not only each amount against which an overpayment is applied, but to also calculate interest to the date said overpayment was applied. This is an ad hoc approach that would doubtless require new procedures to be spelled out for this calculation. It would also be completely unpredictable, resulting in overpayment interest calculations performed not with regard to the statutory language itself or the operational events giving rise to a tax liability, but dependent on ministerial acts of the agency. The text of I.R.C. § 6611(b)(1) is not convincing that Congress intended such a haphazard result.

On the other hand, defendant's position that "due date" is defined by the Treasury Regulation harmonizes with the principle of predictability and comports with the statutory language. The "due date," as defined by Treas. Reg. § 301.6611-1(h)(2), is "the last day fixed by law or regulation for the payment of the tax (determined without regard to any extension of time)." This date occurs with clockwork regularity and is easily determinable. More importantly, this date can fairly be read as the "due date of the amount against which the credit is taken." I.R.C. § 6611(b)(1). This construction, in sum, does not require an "expansive reading" of the "use of money" principle that plaintiff espouses.

Brown & Williamson, 688 F.2d at 751; Martin-Marietta, 189 Ct. Cl. at 293, 418 F.2d at 502. The court concludes that Treas. Reg. § 301.6611-1(h)(2), and the thrust of the statutory language, if not its literal meaning, commend defendant's reading of I.R.C. § 6611(b)(1) and are sufficient to establish that the "due date" is "the last day fixed by law or regulation for the payment of tax (determined without regard to any extension of time)."

5. Sovereign immunity

Defendant inveighs that sovereign immunity prohibits an award of interest on the overpayment in this case, reciting the well-settled rule that "in the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Library of Congress v. Shaw, 478 U.S. 310, 314, 92 L. Ed. 2d 250, 106 S. Ct. 2957 (1986). Defendant faults plaintiff for failing to cite any such "statute specifically authorizing the payment of interest in the circumstances of this case." Def.'s Br. filed May 4, 2001, at 5. This is a rather arch statement, considering that the majority of defendant's and plaintiff's arguments are directed to just such a statute explicitly authorizing the payment of overpayment interest -- I.R.C. § 6611(b)(1). More to the point, I.R.C. § 6611(a) explicitly states that "interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax . . . ."

As plaintiff points out, the issue in this case is not whether the United States is obligated to pay interest, but to what extent the United States is obligated to pay interest to plaintiff.[6] As the Federal Circuit held in a case addressing

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[6] Indeed, the Government has already paid some overpayment interest in this case and makes no claim that such interest should be refunded.

the rate of interest to be applied on a claim against the United States under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994 & Supp. V 1999), a claim of sovereign immunity is "irrelevant . . . where the dispute concerns not whether interest runs against the United States but how the interest is to be calculated." J. F. Shea Co. v. United States, 754 F.2d 338, 340 (Fed. Cir. 1985). Such reasoning applies with equal force in the instant case.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion for summary judgment is granted, and plaintiff's cross-motion for summary judgment is denied. The Clerk of the Court shall enter judgment for defendant.

IT IS SO ORDERED.

/s/ Christine O.C. Miller
Christine Odell Cook Miller,
Judge

APPENDIX C

No. 02-5002

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARSH & MCLENNAN COMPANIES, INC.
AND SUBSIDIARIES,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Judgment

ON APPEAL from the United States Court of Federal Claims
In CASE NO(S). 00-CV-205
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED Sep – 6 2002 /s/_____
Jan Norbaly, Clerk

ISSUED AS A MANDATE: November 21, 2002

No. 02-5002

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARSH & MCLENNAN COMPANIES, INC.
AND SUBSIDIARIES,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 21, 2002.

FOR THE COURT,
/s/ _____
Jan Horbaly
Clerk

Dated: November 14, 2002

APPENDIX D

26 U.S.C. §6611

§6611. INTEREST ON OVERPAYMENTS.

* * *

(b) PERIOD.—Such interest shall be allowed and paid as follows:

(1) CREDITS.—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken.

(2) REFUNDS.—In the case of a refund, from the date of the overpayment to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(3) LATE RETURNS.—Notwithstanding paragraph (1) or (2) in the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

* * *

APPENDIX E

26 U.S.C. §6402

§6402. AUTHORITY TO MAKE CREDITS OR REFUNDS.

(a) GENERAL RULE.—In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), and (e), refund any balance to such person.

(b) CREDITS AGAINST ESTIMATED TAX.—The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

* * *

APPENDIX F

26 U.S.C. §6601

§6601. INTEREST ON UNDERPAYMENT, NONPAYMENT, OR EXTENSIONS OF TIME FOR PAYMENT, OF TAX.

(a) GENERAL RULE.—If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.

* * *

APPENDIX G

26 C.F.R. §301.6611-1

§301.6611-1. Interest On Overpayments.

* * *

(h) *Period for which interest allowable in case of credits*—(1) *General rule.* If an overpayment of tax is credited, interest shall be allowed from the date of overpayment to the due date (as determined under subparagraph (2) of this paragraph (h)) of the amount against which such overpayment is credited.

(2) *Determination of due date* — (i) *In general.* The term "due date", as used in this section, means the last day fixed by law or regulations for the payment of the tax (determined without regard to any extension of time), and not the date on which the district director or the director of the regional service center makes demand for the payment of the tax. Therefore, the due date of a tax (other than an additional assessment subject to the special rule provided by subdivision (iv) of this subparagraph) is the date fixed for the payment of the tax or the several installments thereof.

(ii) *Tax payable in installments* — (a) *In general.* In the case of a credit against a tax, where the taxpayer had properly elected to pay the tax in installments, the due date is the date prescribed for the payment of the installment against which the credit is applied.

(b) *Delinquent installment.* If the taxpayer is delinquent in payment of an installment of tax and a notice and demand has been issued for the payment of the delinquent installment and the remaining installments, the due date of each remaining installment shall then be the date of such notice and demand.

(iii) Tax or installment not yet due. If a taxpayer agrees to the crediting of an overpayment against tax or an installment of tax and the schedule of allowance is signed prior to the date on which such tax or installment would otherwise become due, then the due date of such tax or installment shall be the date on which such schedule is signed.

(iv) Additional assessment satisfied by credit before January 1, 1958. In the case of a credit made before January 1, 1958, against an additional assessment, the due date of the tax satisfied by the credit is the date the additional assessment was made. For purposes of this subdivision, the term "additional assessment" means a further assessment of a tax of the same character previously paid in part, and includes the assessment of a deficiency as defined in section 6211.

(v) Interest. In the case of a credit against interest that accrues for any period ending prior to January 1, 1983, the due date is the earlier of the date of assessment of such interest or December 31, 1982. In the case of a credit against interest that accrues for any period beginning on or after December 31, 1982, such interest is due as it economically accrues on a daily basis, rather than when it is assessed.

(vi) Additional amount, addition to the tax, or assessable penalty. In the case of a credit against an additional amount, addition to the tax, or assessable penalty, the due date is the earlier of the date of assessment or the date from which such amount would bear interest if not satisfied by payment or credit.

(vii) Estimated income tax for succeeding year. If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof.

APPENDIX H

26 C.F.R. §301.6402-3(b)

§301.6402-3(b). Special rules applicable to income tax.

* * *

(5) An election to treat the return as a claim for refund or credit shall be evidenced by a statement on the return setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return is filed. If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated income tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.